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## NOTE AND COMMENT

CONSTITUTIONAL LAW—APPLICABILITY OF FIRST TEN AMENDMENTS TO UNINCORPORATED TERRITORY—A man was killed aboard an American ship in a Virgin Island port. A police investigation was started the next day and continued for twelve days thereafter, during which twenty three witnesses were examined by the government. During most of the investigation the prisoners were present, and most of the testimony was translated into Spanish for their benefit, that being the only language they understood. No formal charge had been made against them and they were without counsel, but they were given an opportunity to "explain" after the testimony of each witness. The record was then transferred to the District court where the same judge presided, assisted by four lay judges. Formal charge was made, and the prisoners had counsel. The trial consisted of arguments on the facts as found in the above investigation, no more witnesses being called, although the prisoners were given the opportunity of calling witnesses in their behalf. They were found guilty. Act of Congress of March 3, 1917 (39 Stat. c. 171) provided that, as to judicial proceedings, the local laws should continue in effect *"in so far as compatible with the changed sovereignty,"* until Congress should otherwise provide. It was assumed that the above proceedings were in accord with the "local laws" as established by Denmark. *Held,* the prisoners are

entitled to a new trial, for the new sovereignty gives them the right to be confronted by the witnesses against them, and to be heard through cross-examination. *Soto* v. *U. S.*, (C. C. A., 3d Circ., 1921), 273 Fed. 628.

As the new sovereign of the Virgin Islands is our Federal Government, and as that Government must look to the Constitution for all its power, the phrase "in so far as compatible with the changed sovereignty" should mean in so far as not in conflict with the Constitution.

Since the war with Spain the determination of the legal status of our outlying territories and the inhabitants thereof has been a difficult problem, and a solution satisfactory from the view point of certainty has not been reached. The actual decisions by the Supreme Court are few in number, and narrow in scope, and have been by a court divided four against five. While the statements of principles in these cases have covered the whole field of territorial government and private rights thereunder very thoroughly, no one theory has had the sanction of a majority of the court.

As the law now stands, excepting from consideration foreign territory temporarily occupied and territory taken for consular jurisdiction, the authority of the federal government extends over three classes of territory, namely, states, incorporated territory, and unincorporated territory. The Constitution is operative over the whole, in so far as its provisions are applicable. All are applicable to the states. All are applicable to incorporated territory, except those which by their nature can pertain to states only. As to what provisions are applicable to unincorporated territory, no general statement can be made with any assurance of accuracy. Such territory is not foreign territory in an international sense. *De Lima* v. *Bidwell,* 182 U. S. 1. It is foreign territory in a domestic sense, for instance, within the meaning of the revenue clauses of the Constitution. *Downes* v. *Bidwell,* 182 U. S. 244. Indictment by a grand jury and verdict by unanimous vote of twelve petit jurors are not necessary parts of a valid criminal trial in unincorporated territory. *Hawaii* v. *Mankichi,* 190 U. 197; *Dorr* v. *U. S.,* 195 U. S. 138. Actual decisions carry us no further. *Kepner* v. *U. S.,* 195 U. S. 100, adds nothing, for while it holds that the accused in the Philippines cannot be subjected to double jeopardy, Congress had specifically provided such guarantee by statute for that territory. Act of July 1, 1902 (32 Stat. 691). The fact that Congress has given the Philippines and Hawaii bills of rights containing nearly all the provisions of the first ten amendments to the Constitution, explains, perhaps, why the Supreme Court has not been called upon more frequently to decide just which of these provisions are applicable in the absence of such act of Congress, to unincorporated territory. At any rate, actual decisions have not gone far in determining which provisions of the first ten amendments are applicable to unincorporated territory, and which are not.

If we turn, for a basis of division of these provisions, from authority to the principles and theories set forth by the various members of the court in the Insular Cases, we are met with a sharp conflict of views. The theory of Mr. Justice Brown that the Constitution is operative in a given territory only when specifically "extended" to that territory by Congress, *Rassmussen* v. *U. S.,* 197 U. S. 516, has met with but little approval. The theory which had the

sanction of more members of the court than any other was that all territory should be lumped together and that all the provisions of the Constitution should be applicable to all territory, except those provisions which could pertain to the states alone. The justices responsible for this proposition, however, were in the minority as to the actual decisions. Their theory seems necessary neither as a matter of logic nor upon authority, and from the view point of expediency would hardly be workable. The doctrine which is the basis of the decision in the instant case, namely, that certain provisions of the bill of rights are remedial or procedural only, and can be dispensed with in unincorporated territory, while other provisions guarantee rights that are fundamental, or natural, and cannot be denied anywhere under our flag, it is submitted, really dodges the difficulty. For instance, which of the rights stated in the Sixth Amendment are fundamental, or natural, and which remedial only? The doctrine sounds well, but it is likewise unworkable.

Under another test suggested in the Insular Cases it is very doubtful if the principal case could be sustained. Under this theory only those provisions of the first eight amendments are applicable to unincorporated territory which are in terms a prohibition upon the body which must act in order to deny the right, to so act. This test has the merit of greater certainty. The difference between "Congress shall pass no law" in the First Amendment, and "the accused shall enjoy" in the Sixth, is clear cut. To adopt this doctrine does not mean that, as a matter of constitutional law, the inhabitants of unincorporated territory could have none of the rights which by this test are found to be inapplicable to such territory. It simply means that Congress would be unfettered in its administration of such territory, except in so far as it is expressly prohibited from denying certain rights. True, this would permit Congress to withhold from such territory certain rights which in the states are highly valued, but government of new territory means meeting new conditions, and some measure of discretion is necessary for success. Congressional government of our territories has never tended to tyranny. Illustrations of this fact are to be found from the time of the adoption of the Constitution to the present day, including the Act of March 3, 1917 (39 Stat. c. 171) providing for the temporary government of the Virgin Islands. The bill of rights given the Philippines, Act of July 1, 1902 (32 Stat. 691) is convincing evidence of the policy of Congress to grant to the people of our unincorporated territories every right or safeguard they are prepared to receive and wisely use. As was said by Holmes, J., in *Kepner* v. *U. S., supra,* the danger now is that criminals will escape justice, not that they will be subjected to tyranny. Admittedly, the Virgin Islands are unincorporated territory. Admittedly, also, the decision of the instant case may unsettle the public mind there, and interfere with the administration of justice, coming as it does before the people are prepared for the change. The situation here is very nearly the same as that involved in *Hawaii* v. *Mankichi,* 190 U. S. 197, where the result of invalidating the customary criminal procedure was carefully considered—and avoided. It is submitted that the decision of the instant case could likewise have been avoided, upon sound principles, as outlined above, and without conflict with any previous authority.

For further authorities upon the subject in general, see *Fourteen Diamond Rings* v. *U. S.*, 183 U. S. 176; *Dooley* v. *U. S.*, 182 U. S. 222; 41 *Am. L. Rev.* 239; *Malcolm, Philippine Constitutional Law,* 149-157; *Willoughby, Constitutional Law,* Ch. 24, 25, 29 and 30. D. H. B.

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DECLARATORY JUDGMENT—DECLARING RIGHTS UNDER THE GUISE OF GRANTING AN INJUNCTION—It has often been held that a party may obtain a judicial determination of his rights in respect to legislation alleged to be invalid, by means of an application to a court of equity for an injunction restraining the enforcement of the statute. *Ex parte Young* (1907) 209 U. S. 123, is the leading case of this type. There, a railroad rate statute was involved, which required compliance by all railroad companies in the state, under the threat of heavy penalties. The railroad actually violated the provisions of the statute after an injunction had been obtained by a stockholder restraining the company from complying, and prosecution for the violation was prevented by an injunction against the attorney general. The latter injunction, it must be noted, was an effective and appropriate order, because acts of violation were in fact taking place which would otherwise have called forth action by the attorney general. The injunction could not, therefore, be looked upon as anything but a genuinely operative remedy. *Truax* v. *Raich* (1915) 239 U. S. 33, *Michigan Salt Works* v. *Baird* (1913) 173 Mich. 655, and other like cases, were all similar in this respect. In each, the act for which the prosecution was feared had been committed, and the injunction was employed as a protection against a presently possible prosecution.

But let it be supposed that the case is one where no violation of the statute has taken place and where none is contemplated until after the court has passed upon its validity. Is there anything to enjoin? The attorney general cannot prosecute because nothing has been done upon which to base a prosecution. Can the attorney general be enjoined from prosecuting before any violation or even threat of violation has occurred?

In *Anway* v. *Grand Rapids Ry. Co.* (1920) 211 Mich. 592, an effort was made to obtain a decision from the court as to whether a contract could legally be made which the plaintiff alleged that he was desirous of making. The plaintiff feared the penalties of a statute. He had no intention of entering into the proposed contract unless he was first assured by the court that he would not be liable for the penalty. He asked for a declaration of rights, under the Declaratory Judgment Act, and got it, but the supreme court held that at this stage there was no controversy pending, and that the declaration was only a decision on a moot question and therefore invalid. Apparently it was the view of the supreme court of Michigan that until the plaintiff did some act upon which the penal statute could operate, there could be no judicial question. In this view of the proceedings the addition of a prayer for an injunction against the attorney general would have added nothing to the substance of the case, for no prosecution was possible because there was no violation of the statute, either actual or threatened. The infirmity in the case was held to go much deeper than a mere procedural failure to add a suitable prayer. The court held that there was no cause of action in existence